Supreme Court, U.S.
FILED
JAN 5 1996
CLERK

95-1098

No. 95-____

In the

Supreme Court of the United States

OCTOBER TERM, 1995

CARMINE CASELLA,

Petitioner,

v.

EQUIFAX CREDIT INFORMATION SERVICES AND TRANS UNION CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

JAMES B. FISHMAN
FISHMAN & NEIL
319 Broadway, Suite 400
New York, NY 10007
(212) 406-0570

MICHAEL E. TANKERSLEY
(Counsel of Record)
DAVID C. VLADECK
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Petiioners

61 pp

QUESTIONS PRESENTED

1. Does the Fair Credit Reporting Act require a consumer to wait until an inaccurate credit report is disseminated to third parties before the consumer may maintain a cause of action against a credit reporting agency that has refused to delete the inaccurate information or to comply with its obligation to report that the entry is disputed by the consumer?

2. Does the interpretation of "willful" adopted by this Court in *Hazen Paper Company v. Biggins*, 113 S. Ct. 1701 (1993), and prior decisions apply in actions for willful failure to comply with the Fair Credit Reporting Act?

(THIS PAGE INTENTIONALLY LEFT BLANK)

TABLE OF CONTENTS

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3
- A. The FCRA 4
- B. Inaccurate Credit Reports Concerning Petitioner. 6
- C. The Decision Below. 10

SUMMARY OF REASONS FOR GRANTING THE WRIT 11

REASONS FOR GRANTING THE WRIT 14

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT IN THE CIRCUITS REGARDING WHETHER DENIAL OF CREDIT OR PUBLICATION OF DEROGATORY CREDIT INFORMATION IS A PREREQUISITE TO AN ACTION FOR ACTUAL DAMAGES UNDER THE FCRA. 14

II. THIS COURT SHOULD GRANT REVIEW BECAUSE THE CIRCUIT COURT'S CONSTRUCTION OF WILLFUL FAILURE TO COMPLY UNDER THE FCRA IS INCONSISTENT WITH THIS COURT'S DECISIONS CONCERNING THE INTERPRETATION OF SIMILAR STATUTES. 19

CONCLUSION 23

APPENDIX

TABLE OF AUTHORITIES

CASES

Page

Bryant v. TRW, Inc.,
689 F.2d 72 (6th Cir. 1982) 17

Fischl v. General Motors Acceptance Corp.,
708 F.2d 143 (5th Cir. 1983) 15

Guimond v. Trans Union Credit Information Co.,
45 F.3d 1329 (9th Cir. 1995) 3, 13, 16

Hazen Paper Company v. Biggins,
113 S. Ct. 1701 (1993) 1, 13, 20

Ladner v. Equifax Credit Information Services, Inc.,
828 F. Supp. 427 (S.D. Miss. 1993) 18

McLaughlin v. Richland Shoe Co.,
486 U.S. 128 (1988) 20, 21

Millstone v. O'Hanlon Reports, Inc.,
528 F.2d 829 (8th Cir. 1976) 11, 17

Nitti v. Credit Bureau of Rochester, Inc.,
375 N.Y.S.2d 817 (Sup. Ct. 1975) 11

Pinner v. Schmidt,
805 F.2d 1258 (5th Cir. 1986),
cert. denied, 483 U.S. 1022 (1987) 11, 20

Rasor v. Retail Credit Co.,
81 Wash. 2d 516, 554 P.2d 1041 (1976) 15

Stevenson v. TRW, Inc.,
987 F.2d 288 (5th Cir. 1993) 17, 20, 22

Stewart v. Credit Bureau, Inc.,
734 F.2d 47 (1984) 13, 16

Swoager v. Credit Bureau of Greater St. Petersburg,
608 F. Supp. 972 (D. Fl. 1985) 22

Thompson v. San Antonio Retail Merchants Ass'n,
682 F.2d 509 (1982) 13, 15, 17

Trans World Airlines, Inc. v. Thurston,
469 U.S. 111 (1985) 20, 21

United States v. Illinois Central R. Co.,
303 U.S. 239 (1938) 21

STATUTES

Fair Credit Reporting Act, 15 U.S.C. §§ 1681-81t 6
15 U.S.C. § 1681e(b) 6
15 U.S.C. § 1681g 6
15 U.S.C. § 1681i 6, 21
15 U.S.C. § 1681n 2, 19
15 U.S.C. § 1681o 2, 3, 12, 18

28 U.S.C. § 1254(1) 1
29 U.S.C. § 216(a) 20
29 U.S.C. § 626(b) 20

MISCELLANEOUS

115 Cong. Rec. 33409 (1969) 14

S. Rep. 103-209, 103d Cong.,
1st Sess. (1993) 4, 15

The Consumer Reporting Reform Act of 1993, Hearings Before the Subcommittee on Consumer Credit and Insurance of the House Committee on Banking, Finance, and Urban Affairs, 103d Cong., 1st Sess., S. Hrg. 103-80 (1993) 4, 15

B. Sherland, *The Functions of Consumer Reporting Agencies Under the Fair Credit Reporting Act*, 59 WASH. LAW REV. 401 (1984) 4

(THIS PAGE INTENTIONALLY LEFT BLANK)

No. 95-____

In the

Supreme Court of the United States

OCTOBER TERM, 1995

CARMINE CASELLA,

Petitioner,

v.

EQUIFAX CREDIT INFORMATION SERVICES AND TRANS UNION CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 56 F.3d 469, and is reprinted in the Appendix to this petition at pages A1-A12. The memoranda decisions of the District Court for the Southern District of New York granting respondents' motions for summary judgment and denying petitioner's motion for relief from judgment are not reported and appear at pages A13-A28 of the Appendix.

JURISDICTION

The Court of Appeals for the Second Circuit entered judgment on June 5, 1995. A timely petition for rehearing was denied on September 18, 1995. *See* A29. On November 30, 1995, Justice Ginsburg granted petitioner's request to extend the time to file this petition to and including January 8, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 616 and 617 of the Fair Credit Reporting Act provide:

Section 616. Civil liability for willful noncompliance. [15 U.S.C. § 1681n].

Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of -

(1) any actual damages sustained by the consumer as a result of the failure;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

Section 617. Civil liability for negligent noncompliance.[15 U.S.C. § 1681o].

Any consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of -

(1) any actual damages sustained by the consumer as a result of the failure;

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

STATEMENT OF THE CASE

Two consumer reporting agencies, respondents in this action, issued credit reports that erroneously stated that petitioner had defaulted on his child support obligations. Although petitioner provided the agencies with court orders demonstrating that the entry was wrong, and the creditor who originally reported this alleged debt notified the reporting agencies that the entry was wrong, the reporting agencies failed to correct the error and continued to list the purported debt as an undisputed obligation until petitioner brought suit under the Fair Credit Reporting Act ("FCRA"). To minimize the risk that the erroneous and embarrassing credit reports would be published, petitioner deliberately refrained from applying for credit to purchase a new home until the credit reports were corrected. In the decision below, the Second Circuit held that petitioner's failure to apply for credit when the error continued to appear on his credit report deprived him of any cause of action under the FCRA.

Although the FCRA provides for recovery of "any actual damages sustained by the consumer as a result" of failure to comply with the Act, 15 U.S.C. § 1681o, the Second Circuit held that the Act provides a remedy *only* if the consumer's damages result from publication of derogatory credit information to third parties. In doing so, the Second Circuit acknowledged that its holding is in conflict with *Guimond v. Trans Union Credit Information Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995), in which the Ninth Circuit held that a consumer damaged by violation of the FCRA does not have to endure the publication of derogatory credit information in order to maintain an action under the FCRA. The Second Circuit also held that the evidence that the reporting agencies had not corrected the error or even noted that the entry was disputed was insufficient as a matter of law to sustain a cause of action for "willfully" failing to comply with the Act because the court interpreted this term to require proof of conscious and deliberate disregard for the law.

A. The FCRA

Consumer reporting agencies maintain reports on the credit history and financial status of 90 percent of all Americans.[1] Most of these reports are based on computerized exchanges of information between consumer reporting agencies and banks, finance companies, and other creditors that subscribe to the credit reporting service. Surveys have found that up to 48 percent of credit reports contain one or more errors, and as many as 19 percent contain errors that could adversely affect the consumer's eligibility for credit.[2]

The information in these credit reports is sold to lenders, retailers, prospective employers, and government agencies evaluating a consumer's application for credit or suitability for employment. Consumers are generally not given the opportunity to review the accuracy of credit reports before they are released, nor are they notified when the reports are being requested by and disseminated to third parties. Rather, consumers usually become aware of adverse credit reports indirectly, after the fact, when they are notified that they have been denied credit or employment because of adverse information supplied by a reporting agency.[3]

In 1970, Congress enacted the FCRA to protect consumers against inaccurate reports and provide a remedy against misconduct by credit agencies. *See* 15 U.S.C. §§ 1681-81t. The

---

[1] *See* S. Rep. 103-209, 103d Cong., 1st Sess. 1 (1993).

[2] *See id.* at 3; Testimony of Michelle Meier, Consumers Union, in *The Consumer Reporting Reform Act of 1993, Hearings Before the Subcommittee on Consumer Credit and Insurance of the House Committee on Banking, Finance, and Urban Affairs*, 103d Cong., 1st Sess., S. Hrg. 103-80, 206 (1993).

[3] *See* B. Sherland, *The Functions of Consumer Reporting Agencies Under the Fair Credit Reporting Act*, 59 WASH. LAW REV. 401, 403 (1984).

FCRA provides that consumer reporting agencies must "follow reasonable procedures to assure maximum possible accuracy of the information" in credit reports, 15 U.S.C. § 1681e(b), and gives the consumer the right to review the information on the consumer in the reporting agency's files. *Id.* §§ 1681g(a)(1), (2). If the consumer discovers errors in the report, the Act imposes three obligations that petitioner alleges were violated in this case:

First, when the consumer notifies the consumer reporting agency that he or she disputes the completeness or accuracy of any item in the report, the reporting agency must reinvestigate the disputed item and delete the information if it is inaccurate or cannot be verified. *Id.* § 1681i(a).

Second, if the reinvestigation does not resolve the dispute, the consumer may file a statement setting forth the nature of the dispute. *Id.* § 1681i(b). Whenever such a statement of dispute is filed, the consumer reporting agency must clearly note in future reports that the item is disputed and provide either the consumer's statement or a clear and accurate summary of the statement. *Id.* § 1681i(c). The reporting agency may refuse to reinvestigate or to include a consumer dispute statement only if the agency has reasonable grounds to believe that the dispute or the statement "is frivolous and irrelevant." *Id.* §§ 1681i(a), (c).

Finally, the consumer is entitled to know who may have received reports containing the disputed information. If requested, the reporting agency must disclose to the consumer the recipients of any consumer reports the agency furnished for employment purposes during the two years preceding the request, and the recipients of reports furnished for any other purpose during the preceding six months. *Id.* §§ 1681g(a)(3). If requested by the consumer, the reporting agency must also notify any person who has received a copy of the report that the item at issue has been deleted, cannot be verified, or is disputed by the consumer. *Id.* §§ 1681i(d).

If a consumer reporting agency fails to comply with these obligations or other provisions of the Act, the FCRA provides that the agency is liable for "any actual damages sustained by the consumer as a result of" negligent or willful failure to comply with the FCRA. *Id.* §§ 1681n(1), 1681o(1). Punitive damages may be awarded if the consumer reporting agency "willfully fails to comply" with any requirement of the Act. *Id.* § 1681n(2).

B. Inaccurate Credit Reports Concerning Petitioner.

For seven years, from 1982 through 1989, Petitioner Carmine Casella was involved in bitter interstate child custody litigation. App. at A13. At the conclusion of the litigation, the New York State Family Court issued an order confirming that Mr. Casella had fully satisfied his support obligations and, indeed, had overpaid $635.00.

However, in March, 1992, Mr. Casella was denied credit by two banks based on information in credit reports supplied by Trans Union and Equifax Credit Information Services ("Equifax"). App. at A14. The only derogatory entry in the credit reports of both of these agencies was an entry that stated that Mr. Casella had defaulted on his child support obligation and owed $4,350 to the San Diego County Revenue and Recovery Unit. App. at A3, A14. Upon learning of the erroneous reports, Mr. Casella immediately contacted an attorney for assistance in correcting the credit reports. In addition, he stopped his search for a home to purchase because of concern that the adverse credit reports would make it impossible for him to secure a mortgage and that applying for such a mortgage would only promote publication of the erroneous report that he was derelict in his child support obligations.

On April 3, 1992, Mr. Casella's counsel wrote letters to Trans Union and Equifax requesting that the agencies delete the entry stating that Mr. Casella was delinquent in his child support payments. The letter was accompanied by an affidavit by Mr.

Casella, copies of the court orders issued by the New York Family Court, and a letter from the New York Deputy Commissioner of Human Resources confirming that Mr. Casella had fully satisfied the debt over three years earlier. *Id.* The April 3, 1992 letters also requested that the reporting agencies provide the names of any persons to whom the agencies had reported this child support entry in employment, credit or background checks, and that the agencies notify anyone who had received this inaccurate report of the error.

Trans Union responded to this letter by informing Mr. Casella that it had verified the accuracy of the child support entry and therefore would not delete it from his credit report, but invited Mr. Casella to submit a consumer statement regarding the dispute. App. at A3.[4] On June 16, 1992, Mr. Casella's attorney again wrote to Trans Union requesting that it delete the child support entry and he submitted a statement of dispute to be included in Mr. Casella's credit file if the entry was not deleted. App. at A4. Trans Union did not comply with these requests. In July, 1992, Trans Union sent Mr. Casella a report that listed the child support debt as the lead entry in his report and failed to include any indication that this entry was disputed. *Id.* at A3-A4, A15.[5] Trans Union also did not notify persons who had received the report that the child support entry was disputed.

---

[4] In the proceedings below, Trans Union stated that it reinvestigated the entry, but it provided no description of its reinvestigation or explanation of how it reconciled the entry with the court orders submitted by Mr. Casella. The only source identified for the "reinvestigation" was an entry on computer tapes automatically loaded into the Trans Union database.

[5] As noted by the court of appeals, the district court erroneously concluded that Mr. Casella did not provide a statement of dispute when the undisputed facts showed that counsel for Casella sent a notarized copy of such a statement to Trans Union on June 16, 1992. *See* App. at A3-A4 and A15, A21.

In response to the April 3, 1992 letter, Equifax initially deleted the entry and sent Mr. Casella a new report indicating that the child support entry had been removed. App. at A3. Equifax had the ability to prevent the entry from reappearing in the credit report by permanently blocking it from its database, but it did not do so. As a result, in May or June, 1992, the child support entry was reinserted into Mr. Casella's credit file by Equifax's automated system for compiling credit reports. *Id.*[6] In July, 1992, Equifax sent Mr. Casella a credit report that corrected other errors identified by Mr. Casella, but once again listed the erroneous $4,350 child support debt, and contained no indication that this entry was disputed. *Id.* at A15. Like Trans Union, Equifax did not respond to Mr. Casella's request that the persons to whom the report had been provided be notified of the error.

After receiving the two July, 1992 credit reports, Mr. Casella convinced the San Diego authorities to delete the erroneous child support entry from their records. On October 28, 1992, the San Diego authorities sent Mr. Casella a letter stating that they were notifying creditors and credit bureaus that the child support entry was an error, but advised that it generally takes credit reporting agencies 30-60 days to correct their records. App. at A4. Mr. Casella continued to refrain from applying for credit during this period.

Equifax and Trans Union deny receiving any such notification from San Diego, *id.*, but this claim is contradicted by an affidavit affirming that on October 14, 1992, San Diego sent "Universal Data Forms" to the reporting agencies directing that the child support entry be deleted. App. at A4, A27. However, the child

---

[6] The credit report stated that the item was reported in May, 1992, but Equifax submitted an affidavit stating that the entry was automatically reported by magnetic tape in mid-June.

support entry continued to appear on the computer tapes used to compile the Trans Union and Equifax credit reports.

Neither Trans Union nor Equifax deleted the child support entry. On February 1, 1993, Mr. Casella was preparing to renew his search to purchase a home and requested copies of his credit report from both agencies to verify that the child support entry had been deleted. Both agencies responded by providing Mr. Casella with reports that continued to state that he had defaulted in his child support obligation and gave no indication that this entry was disputed. App. at A15. In June, 1993, Mr. Casella filed for relief under the FCRA. Upon filing of the suit, both agencies immediately acknowledged that the child support entry was inaccurate.

During the fourteen months that he was aware that Equifax and Trans Union included the erroneous child support obligation in their reports, petitioner refrained from submitting applications for credit in order to minimize the risk that the error would be published. App. at A4. As Mr. Casella's affidavit in the proceedings below states:

> I am at the point in my life where I would like to buy a home and settle down for the long haul. I could see no hope of being able to do that if I let it be broadcast about that there exists a claim against me for unpaid child support, no matter how erroneous it might eventually be revealed to be, so I took the only sane and sensible course I could determine, which was not to apply for any more credit anywhere until this matter had been settled and cleared up for good.

Affidavit of Carmine Casella, ¶ 133.

However, shortly before he was notified of the erroneous reports, Mr. Casella had applied for a position with his local volunteer fire department that required a background and credit check. App. at A15. Mr. Casella claimed damages for anxiety

and fear that the accusation that he defaulted on his obligations as a father would be published through dissemination of the erroneous credit reports to neighbors involved in considering his application at the fire department, or to unknown others who may have received the report from the reporting agencies. *Id.* at A8, A23. After suit was filed, Equifax and Trans Union reported that the credit report had not been requested by the fire department or any person after Mr. Casella first notified them of the error in April, 1992. Mr. Casella also claimed damages for loss of the opportunity to secure a mortgage at low mortgage rates during the period that the Trans Union and Equifax failed to correct the child support entry, and punitive damages for the agencies' willful failure to comply with their obligations under the FCRA. *Id.* at A10, A11.

C. The Decision Below.

The district court granted summary judgment for Equifax and Trans Union, *see* App. at A13-25, and denied plaintiff's motion for relief from the judgment based on new evidence showing that San Diego authorities had instructed the reporting agencies to delete the child support entry in October, 1992. *Id.* at A26-28. The court of appeals affirmed on the grounds that Mr. Casella's damages were not compensable under the FCRA. App. at A6.

The court of appeals acknowledged that the FCRA provides that credit reporting agencies are liable for "actual damages" sustained by the consumer as a result of negligent or willful failure to comply with the Act, App. at A6-7 (citing 15 U.S.C. §§ 1681n, 1681o), and that "actual damages" under the Act includes damages for pain and suffering. *Id.* at A8-9. However, the court held that Mr. Casella's claims for pain and suffering were not compensable because they were not caused by dissemination of the erroneous report to third parties, and that he could not recover for loss of opportunity because "he refrained from making any credit applications in order not to tarnish further

his credit history." *Id.* at A10-11. Despite the contrary holding of the Ninth Circuit, the court held that a consumer cannot maintain a cause of action for "actual damages" under the FCRA absent proof of a denial of credit or publication of derogatory information to third persons. *Id.* at A9-10. The court also held that Mr. Casella could not recover the $2,641.83 in attorneys fees he had incurred in notifying the consumer reporting agencies of the error. *Id.* at A7-8.

The court recognized that punitive damages may be available under the FCRA even if the consumer did not incur actual damages. However, the court held that Mr. Casella could not maintain an action for punitive damages because the summary judgment record was insufficient as a matter of law to support the inference that either agency had "willfully" failed to comply with the Act. *Id.* at A11. In doing so, the court cited none of this Court's precedents regarding the meaning of the term "willful," but instead interpreted the willful noncompliance provision of the FCRA to require proof of "'conscious disregard' or 'deliberate and purposeful' actions." App. at A12 (citing *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986), *cert. denied*, 483 U.S. 1022 (1987); *Nitti v. Credit Bureau of Rochester, Inc.*, 375 N.Y.S.2d 817, 821 (Sup. Ct. 1975), and *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 835 (8th Cir. 1976)).

SUMMARY OF REASONS FOR GRANTING THE WRIT

This case concerns a fourteen month-long Orwellian nightmare in which petitioner confronted computerized systems that continued to generate inaccurate reports that he had defaulted on his child support obligations, despite court orders to the contrary, because the reporting agencies refused to intervene and correct the error or even note that the claim was disputed. Congress enacted the FCRA to ensure that consumers caught up in the automated trap that faced Mr. Casella have both tools to force

reporting agencies to behave responsibly, and a right to sue to recover damages where, as here, the reporting agencies disregard their obligations under the Act. The decision below warrants review because it strips away the vital protections Congress conferred on consumers through the FCRA.

The FCRA sets forth a two-tiered liability scheme authorizing consumers to bring an action for actual damages resulting from negligent violations of the Act, 15 U.S.C. § 1681o, and, where the reporting agency "willfully fails to comply" with the Act, an action for punitive damages. *Id.* § 1681n. This liability scheme was designed to give consumers a meaningful remedy if they are wrongly treated by reporting agencies and to provide incentives for reporting agencies to obey the law. In the decision below, however, the Second Circuit held that, because Mr. Cassella wisely sought to avoid the embarrassment and adverse financial consequences of being denied a mortgage for the fourteen months the respondents obdurately refused to correct his credit report, he forfeited his rights to redress under FCRA.

This decision warrants review for three related reasons. First, we cannot overemphasize the damage the Second Circuit's ruling does to the enforcement of the FCRA. Under the ruling below, a consumer is barred from bringing a lawsuit against a reporting agency that refuses to delete an inaccurate item, fails to investigate a claim of error, or even refuses to note that an entry is disputed by the consumer unless the consumer takes the utterly irrational step of encouraging the dissemination of the false and damaging information, and suffering the financial and emotional consequences that flow from the release of such information. That is precisely the Hobson's choice the FCRA was designed to prevent. A consumer who identifies errors in a credit reporting agency report should not be required to have inaccurate, derogatory information published in order to maintain an action to redress the reporting agencies' failure to comply with the statute.

Second, the Second Circuit's ruling that Mr. Casella could not maintain a claim for actual damages conflicts with other Circuit precedent. As the Second Circuit acknowledged, its ruling cannot be reconciled with the Ninth Circuit's decision in *Guimond v. Trans Union Credit Information Co.*, 45 F.3d 1329 (1995), which held that a consumer may maintain an action for actual damages even where the consumer refrains from applying for credit until the erroneous report is corrected. The Second Circuit's ruling is also at odds with the D.C. Circuit's ruling in *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47 (1984), which also held that a claim for damages under the FCRA need not be based on the transmission of inaccurate information to third parties. The Second Circuit's approach also cannot be squared with decisions of the Fifth Circuit and other courts, which have held in cases involving the denial of credit that the consumer may also recover for the pain and suffering associated with the reporting company's failure to correct an erroneous report, precisely the type of damages that the Second Circuit held were not compensable here. *See, e.g., Thompson v. San Antonio Retail Merchants Ass'n*, 682 F.2d 509 (1982). The division among the Circuits is deep and irreconcilable, and warrants this Court's review.

Finally, the Second Circuit's ruling regarding the construction of the term "willful" is in conflict with this Court's interpretation of "willful" in *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993) and other cases where this Court has interpreted the term willful in similar statutes. Particularly alarming is the Second Circuit's decision to adopt a heightened standard for willfulness that requires that the consumer must prove "conscious disregard" or "deliberate or purposeful actions" on the part of the credit agency to prevail on a punitive damage claim. That hurdle will generally be insurmountable, even in a case as egregious as this, because a consumer will rarely be able to show the sort of "deliberate" misconduct described by the Second Circuit in the automated world of credit reporting. The problem here was not

a deliberate scheme to sabotage Mr. Casella's credit, but flagrant indifference to the reporting agencies' obligation to correct errors automatically generated by their computers. Under conventional standards for willfulness, a consumer could prevail on a showing that the credit bureau failed to take reasonable measures to investigate and to correct inaccuracies once the error was brought to its attention. Because the Second Circuit's ruling in this regard is completely at odds with this Court's decisions regarding the proper construction of willful in statutes providing penalties for willful failure to comply, review should be granted.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT IN THE CIRCUITS REGARDING WHETHER DENIAL OF CREDIT OR PUBLICATION OF DEROGATORY CREDIT INFORMATION IS A PREREQUISITE TO AN ACTION FOR ACTUAL DAMAGES UNDER THE FCRA.

One of the principal purposes of the FCRA is to enable consumers to quickly and inexpensively correct the errors that often appear in automated credit reports.[7] However, studies show that consumer reporting agencies often fail to respond to consumer complaints about errors, or delay in reinvestigating and correcting disputed entries. For example, a 1991 study found that consumers who filed complaints with the Federal Trade Commission ("FTC") concerning consumer reports had already complained to the reporting agency for an average of six months

[7] 115 Cong. Rec. 33409 (1969) (remarks of Sen. Proxmire).

without success.[8] Thus, many potential claims under the FCRA involve situations where a consumer reporting agency has ignored a consumer's request that it delete or identify an entry as disputed.

The decision below presents an important conflict among the circuit courts regarding whether consumers in this situation must wait until the erroneous information is disseminated, and suffer the consequences of that dissemination, before they may bring an action for damages under the FCRA. The lower courts have consistently held that the "actual damages" that may be recovered under the FCRA are not limited to out-of-pocket losses, but include any type of compensatory damages, including recovery for humiliation, mental distress and anxiety — even if there are no out of pocket losses.[9] But courts have issued inconsistent decisions on whether recovery is limited to damages caused by denial of credit or publication to third parties. The Second Circuit's holding that a consumer cannot recover for pain and suffering or lost opportunity "when he has failed to show that any creditor or other person ever learned of the derogatory information from a credit reporting agency," App. at A10, is in conflict with decisions in two other circuits.

---

[8] S. Rep. 103-209, 103d Cong., 1st Sess. 6 (1993); *see also The Consumer Reporting Reform Act of 1993, Hearings Before the Subcommittee on Consumer Credit and Insurance of the House Committee on Banking, Finance, and Urban Affairs*, 103d Cong., 1st Sess., S. Hrg. 103-80, 432 (1993) (analysis of 1993 complaints found that consumers who complained to FTC had already complained to credit bureau, without satisfaction, for an average of 31 weeks).

[9] *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 151 (5th Cir. 1983); *Thompson v. San Antonio Retail Merchants Ass'n*, 682 F.2d 509, 513 (5th Cir. 1982); *Rasor v. Retail Credit Co.*, 81 Wash. 2d 516, 554 P.2d 1041, 1048-50 (1976).

First, as the Second Circuit recognized, its decision conflicts with *Guimond v. Trans Union Credit Information Co.*, 45 F.3d 1329 (1995). There, the Ninth Circuit explicitly rejected the limitation on recovery adopted in the decision below. As in Mr. Casella's case, the errors in Ms. Guimond's credit report did not result in any denial of credit. The consumer sought damages for lost opportunities because she had been deterred from applying for credit during the months that she was trying to get Trans Union to correct erroneous entries in her credit report, and damages for nervousness, frustration and mental anguish resulting from the incorrect information in her credit report. *Id.* at 1332. The district court granted summary judgment to Trans Union on the ground that no liability could be imposed on a consumer reporting agency absent a denial of credit. *Id.* The Ninth Circuit reversed, and flatly rejected the argument that FCRA liability must be predicated on the denial of credit or transmission of the inaccurate report to third parties. *Id.* at 1333. The Ninth Circuit held that if the consumer's damages resulted from violation of the FCRA, the FCRA provides that they are recoverable, and the causation issue was properly left to the jury. *Id.*

The District of Columbia Circuit has also held that the FCRA does not limit recovery to damages caused by publication to third parties. In *Stewart v. Credit Bureau, Inc.*, 734 F. 2d 47 (D.C. Cir. 1984), the consumer alleged that he was denied membership in the reporting agency as a result of inaccurate information in the reporting agency's files on him, and he sued for damages. *Id.* at 53. The court of appeals rejected the argument that the FCRA does not provide a cause of action for such damages, holding that, if the reporting agency's denial of membership was caused by an inaccurate entry arising from the agency's own violation of the FCRA, "it is compensable as part of the actual damages resulting from [the agency's] negligent violation of the Act." *Id.* at 54.

The Second Circuit's interpretation of the FCRA is also inconsistent with the approach taken in cases where, although there has been a denial of credit, the sole or principal damages are pain and suffering. In such cases, the courts have not imposed any requirement that the damages be limited to compensation for humiliation or embarrassment caused by transmission of the erroneous report to third parties. For example, in *Thompson v. San Antonio Retail Merchants Association*, 682 F.2d 509 (5th Cir. 1982), the consumer suffered no out-of-pocket expenses due to the erroneous credit reports and after the information was corrected, he was denied credit again on other grounds. *Id.* at 512-13 & n.3. Nevertheless, the court affirmed an award of $10,000 in actual damages for humiliation and mental distress because the consumer had spent months urging the reporting agency to cure the error and succeeded in obtaining a correct report only after bringing suit. *Id.* at 514. In other cases, consumers received credit despite an erroneous report, but claimed damages associated with the months they spent getting the reporting agencies to correct the error. In those cases, the courts have allowed damages for pain and suffering that include compensation for precisely the harms that the Second Circuit held are not compensable in this case: the anxiety, emotional distress, and frustration associated with efforts to correct the erroneous report. *See Stevenson v. TRW, Inc.*, 987 F.2d 288, 296-97 (5th Cir. 1993) (approving award of $30,000 for mental anguish); *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 834-35 (8th Cir. 1976) (affirming award of $2,500 for loss of sleep, nervousness, frustration, and mental anguish); *Bryant v. TRW, Inc.*, 689 F.2d 72, 75-76 (6th Cir. 1982) (approving award of $8,000 for humiliation, embarrassment, anxiety and emotional distress).

The Second Circuit's ruling also imposes an irrational and self-defeating limitation on the remedies provided under the FCRA. Indeed, under the Second Circuit's ruling, where, as

here, an obdurate reporting agency refuses to correct errors in its automated reports or note a dispute, the consumer is confronted with a Hobson's Choice. If the consumer refrains from applying for credit, he or she is precluded from maintaining any action for damages under the FCRA. If, on the other hand, the consumer applies for credit knowing that the erroneous report will be released, the reporting agency may argue that recovery is barred because the consumer failed to mitigate damages. *See Ladner v. Equifax Credit Information Services, Inc.*, 828 F. Supp. 427, 432 (S.D. Miss. 1993) (consumers have duty to mitigate damages under FCRA). Most importantly, the Second Circuit's ruling requires that to redress the reporting agency's failure to comply with the FCRA, the consumer must impose a self-inflicted injury by encouraging the publication of inaccurate and embarrassing information. This is precisely the type of harm that the FCRA was designed to prevent.[10]

The FCRA itself does not indicate any intent to require that inaccurate credit information be disseminated before a consumer can maintain an action for violation of the act. To the contrary, the language of the Act provides that the consumer reporting agency is liable for "any actual damages sustained by the consumer as a result of" negligent or willful violation of the Act without limitation or qualification concerning the cause. 15 U.S.C. §§ 1681n, 1681o. Accordingly, this Court should review

---

[10] The self-inflicted injury to the consumer results not only from publication of the erroneous information in the credit report, but from adding additional information that will injure the consumer's ability to obtain credit. This is so because each inquiry by a creditor is listed in the consumer's credit report and creditors frequently deny credit where the credit history shows frequent inquiries by creditors. Thus, when a consumer is required to apply for credit to maintain an action against the erroneous report, the inquiry will undermine future credit reports, even after the error is deleted, because the inquiry by creditors itself represents derogatory information, particularly where the creditor does not extend credit.

the decision below to resolve the conflict among the circuits on whether the limitation imposed by the Second Circuit is consistent with the Act.

II. THIS COURT SHOULD GRANT REVIEW BECAUSE THE CIRCUIT COURT'S CONSTRUCTION OF WILLFUL FAILURE TO COMPLY UNDER THE FCRA IS INCONSISTENT WITH THIS COURT'S DECISIONS CONCERNING THE INTERPRETATION OF SIMILAR STATUTES.

A consumer confronted with a reporting agency that refuses to delete erroneous information may bring an action for punitive damages under 15 U.S.C. § 1681n, even if there are no actual damages. However, the Second Circuit and a number of other courts have precluded recovery of punitive damages by applying an interpretation of "willfully" that is inconsistent with the standard that this Court has applied in other civil and criminal statutes providing added penalties for willful failure to comply with a statutory obligation. Accordingly, this Court should also grant review to address whether the standard for determining whether a violation is "willful" under the FCRA is the same as that adopted by this Court in interpreting other statutes using this term, or whether a separate, far more exacting standard, is required under the FCRA.

The FCRA provides that punitive damages may be awarded where the consumer reporting agency "willfully fails to comply" with the Act. 15 U.S.C. § 1681n(2). In the decision below, the Second Circuit held that this standard requires proof of "'conscious disregard' or 'deliberate and purposeful' actions." App. at A12. Other FCRA decisions have also construed the "willfully fails to comply" language of the FCRA to require proof

of deliberate disregard for the consumer's rights or other outrageous conduct.[11]

This standard, however, is inconsistent with the manner in which this Court has interpreted "willful" in other criminal and civil statutes. This Court's interpretation of the term "willful" was most recently addressed in *Hazen Paper Company v. Biggins*, 113 S. Ct. 1701 (1993), where this Court reaffirmed its analysis in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). Both cases addressed the interpretation of "willful" in the liquidated damages provision of the Age Discrimination and Employment Act of 1967 ("ADEA"), 29 U.S.C. § 626(b), which is derived from provisions of the Fair Labor Standards Act. 29 U.S.C. § 216(a). The Court observed that the term "willful" was widely used in the law and that, by 1967, it had an accepted judicial interpretation that was well understood by Congress. *See Hazen Paper*, 113 S. Ct. at 1708; *Thurston*, 469 U.S. at 126-27. Based on prior precedents and legislative history, this Court held that the term "willful" requires only that the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Hazen Paper*, 113 S. Ct. at 1710. Moreover, "[o]nce a 'willful' violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the predominant factor rather than a determinative factor in the employment decision." *Id.*; *accord McLaughlin v. Richland Shoe Co.*, 486

---

[11] *See, e.g., Stevenson v. TRW, Inc.*, 987 F.2d at 293-294 (only defendants who engaged in willful misrepresentations or concealment are subject to punitive damages); *Pinner v. Schmidt*, 805 F.2d at 1263 (punitive damages award vacated where there is no evidence to suggest that defendant "willfully set out to do" the consumer harm, or "knowingly and intentionally committed an act in conscious disregard for the rights of others.")

U.S. 128, 133 (1988) ("willful" is generally understood to refer to conduct that is not merely negligent).

The same standard should apply under the FCRA. Like the ADEA, the FCRA establishes a two-tiered liability scheme in which actual damages are recoverable for negligent violations, and liquidated or punitive damages are provided for "willful" violations. *See Thurston*, 469 U.S. at 128. Like the liquidated damages for willful violations of the ADEA, damages under Section 1681n(2) are designed to be punitive in nature. *Id.* at 125. Moreover, the FCRA was adopted just three years after the ADEA. In light of this Court's recognition that Congress intended for the term "willful" to have this meaning in the ADEA, the same interpretation should be applied in construing the virtually identical phrase "willfully fails to comply" in the FCRA. Indeed, long before the ADEA and FCRA were passed, this Court held that a statute providing penalties for a person who willfully fails to comply applies where the defendant disregards the statute or is indifferent to its requirements. *See United States v. Illinois Central R. Co.*, 303 U.S. 239, 243 (1938).

If the standard adopted in *Hazen Paper* and *Thurston* is applied under the FCRA, the evidence in this case is plainly sufficient to survive a motion for summary judgment. The record showed that Trans Union did not note that the entry was disputed as required by 15 U.S.C. § 1681i, even after Trans Union received two letters from Mr. Casella's attorney, an affidavit and court orders showing that the obligation had been paid in full, and a formal consumer statement of dispute. The record also contained evidence that San Diego authorities confirmed that the obligation had been satisfied and the entry was in error in October, 1992, but both reporting agencies continued to list the child support entry as an undisputed item.

The Second Circuit rejected the punitive damages claim on the theory that San Diego "was sending mixed signals to Casella,

Equifax, and Trans Union." App. at A12. However, the inconsistent information from San Diego provides no explanation for the reporting agencies' failure to note that the entry was disputed. Moreover, the reporting agencies' decision to continue to report the child support obligation as an undisputed entry when they had received contradictory information from the creditor concerning its accuracy shows a reckless disregard for the agency's obligations to reinvestigate and ensure the accuracy of their reports. *See, e.g. Stevenson v. TRW, Inc.*, 987 F.2d at 293 (reporting agency has responsibility to evaluate information from creditors when reinvestigating a disputed item); *Swoager v. Credit Bureau of Greater St. Petersburg*, 608 F. Supp. 972, 976 (M.D. Fl. 1985) (reporting agency is not permitted to report whatever information creditor furnishes without question when agency knows item is disputed).

The combined effect of the Second Circuit's interpretation of "willful" and its ruling on actual damages preclude any remedy under the FCRA in many cases where the reporting agency obdurately fails to comply with the Act. Where, as in this case, a consumer is confronted by a reporting agency that refuses to delete an erroneous item or include a dispute statement, the ruling below provides that a consumer does not have a cause of action for actual damages under Section 1681o unless the erroneous credit report is transmitted to third parties, and cannot maintain an action under Section 1681n based on the evidence that the reporting agency has recklessly failed to comply with its obligations under the FCRA. This result undermines the ability of consumers to correct the errors that frequently occur in the automated reports compiled by reporting agencies, and merits review by this Court.

CONCLUSION

For the reasons stated above, the Court should grant the petition for certiorari.

Respectfully submitted,

James B. Fishman
FISHMAN & NEIL
319 Broadway, Suite 400
New York, NY 10007
(212) 406-0570

Michael E. Tankersley
(Counsel of Record)
David C. Vladeck
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Petitioner

January 5, 1996